



**Queensland University of Technology**  
Brisbane Australia

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## **The Cost of Changing Your Mind!**

A recent decision of the Queensland Civil and Administrative Tribunal dealt with the liability of a purchaser to pay a termination penalty where a contract for the purchase of a residential property was terminated during the 'cooling-off' period. The decision is *Lucy Cole Prestige Properties Broadbeach Pty Ltd ATF Gaindri FT Trust t/as Lucy Cole Prestige Properties Broadbeach Pty Ltd v Kastrissios* [2013] QCAT 653.

### **Dispute**

Lucy Cole Prestige Properties Broadbeach Pty Ltd ('the Agent') was appointed by the sellers, Mr and Mrs Kastrissios, to sell their Surfers Paradise unit. The Agent introduced and showed the unit to Messrs Nichol and Morton ('the buyers'). On or around 29 January 2012, the buyers signed a contract to purchase the unit for a purchase price of \$1,950,000. A personal cheque was proffered by the buyers in the sum of \$195,000 being the deposit stipulated by the contract. The cheque was dated 31 January 2012.

On or about 31 January 2012, the buyers terminated the contract. It was accepted that the termination occurred within the five (5) business day 'cooling-off' period provided for by s 370A of the *Property Agents and Motor Dealers Act 2000* (Qld). The Agent stated that the buyers cancelled the personal cheque prior to it being deposited into the Agent's trust account on behalf of the sellers.

The issue for determination was the liability of the buyers to pay the termination penalty as defined in s 364 of the *Property Agents and Motor Dealers Act 2000* (Qld) to be 0.25% of the purchase price under a relevant contract, being a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction. Calculated in this manner, the termination penalty was \$4,875.00.

Section 370A(3) of the *Property Agents and Motor Dealers Act 2000* (Qld) provides that where a contract is terminated during a cooling-off period 'the seller may deduct from any deposit paid under the relevant contract an amount not greater than the termination penalty.' The operation of this statutory language was the essence of this dispute.

With the cancellation of the personal cheque, the Agent did not hold a deposit from which to deduct the termination penalty. This fact was critical in the submission made by the buyers. The buyers' submitted that the Agent was only entitled to recover a termination penalty from them if they paid a deposit. The buyers claimed that as they did not pay a deposit, they were not required to make payment of the termination penalty to the Agent.

### **Decision**

An initial issue was whether the Agent had standing to bring the claim. The sellers under the contract, Mr and Mrs Kastrissios, clearly would have had standing. In the sellers' absence overseas, did the Agent have standing? In this regard, it was relevant that the Agent had been duly appointed in writing in accordance with the statutory requirements and, further, that the signed appointment document provided for the Agent to be entitled to half of any termination penalty. Further, the Agent had been authorised in writing by the sellers to act on the sellers' behalf at the hearing and to

pursue the recovery of the termination penalty from the buyers on their behalf. In these circumstances, the standing of the Agent was held to be established.

The more significant issue for determination was the effect of the cancellation of the deposit cheque. Adjudicator Trueman found that the buyers intended by making their personal cheque available to the Agent to pay a deposit for the unit to be purchased. After the contract was signed the buyers 'got cold feet' and in short period of time had 'changed their mind'. While the adjudicator opined that the buyers were entitled to change their mind, he did not consider that the mere cancellation of the personal cheque that they gave as payment of the deposit removed their liability to pay the termination penalty. Relevantly, Adjudicator Trueman held (at [23]):

It could not be construed that section 370A of PAMDA would be to limit the implementation of a termination penalty only if the deposit was held at the date of the termination of a contract during a 'cooling off' period. In this case a deposit was paid, the cheque was written out and given to the Agents in good faith of a deposit being paid. The Contract was signed by the purchasers and the Agents on 29 January 2012. The cheque was deposited by the Agent despite the termination of the contract. I find that the mere cancellation of a cheque does not render a finding that a deposit had not been paid and therefore that liability for a termination penalty does not arise merely because a penalty fee could not be deducted.

And later at [24]:

They rely on the fact that the cancellation of the deposit cheque means that the deposit was never 'received'. I do not agree with them on that point. The mere fact of the payment of a deposit or not does not of itself incur liability for a termination penalty. In my view it merely suggests that a seller may recover the termination penalty from a deposit, if held.

In the result, the buyers were liable to pay the termination penalty together with various incidental costs.

### **Comment**

The operation of this particular provision in the *Property Agents and Motor Dealers Act 2000* (Qld) is one of the many parts of this legislation that is vexed. While the intention of the legislature may have been for a buyer, who terminates a relevant contract in reliance on a cooling off provision, to be liable in all instances to pay a termination penalty, if the seller so requires, this is not necessarily reflected in the current statutory language. Rather, the present language contemplates that the putative buyer has paid a deposit and that there is an available fund from which the termination penalty may be deducted.

The situation is more complicated if the putative buyer has paid a deposit by a cheque which is subsequently cancelled, as in this instance, or, where the buyer fails to pay a deposit before terminating the contract during the cooling-off period. The rationale of the adjudicator's decision clearly seems capable of extension to the latter situation where the putative buyer simply does not pay a deposit at all rather than making a conditional payment of the deposit by proffering a cheque.

Notwithstanding that this may be an appropriate result, the legislation is lamentably unclear. If it was intended, where a relevant contract is terminated in reliance on the statutory 'cooling-off' provision, that a termination penalty should be recoverable as a debt from the buyer, in the absence of a deposit from which to deduct the penalty, this should have been clearly stated in the legislation.

With the legislation currently under review, hopefully this issue will be clarified once and for all.

Dr Bill Dixon